Supreme Court, U.S.
F I L E D
OCT 3 1995
CLERK

No. 95-370

In The

Supreme Court of the United States

October Term, 1995

MARGARET ATCHLEY,

Petitioner,

vs.

BILLY JACK SMITH and the
CITY OF POTEAU, OKLAHOMA,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

ERIC D. JANZEN (OBA #13826)
Counsel of Record
CHARLES D. NEAL, JR. (OBA #6591)
Of the Firm:
STEIDLEY & NEAL
P.O. Box 1165
McAlester, OK 74502
918/423-4611

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RULE 29.1 STATEMENT

Respondent City of Poteau, Oklahoma is a municipal corporation within the State of Oklahoma and has no parent company nor any corporate subsidiaries. Respondent Billy Jack Smith is an individual and exempt from the Rule 29.1 requirement.

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PETITIONER'S PRESENTATION OF APPELLATE QUESTION

Petitioner's "Question Presented" in her Petition for Writ of Certiorari is not an independently sufficient basis upon which this Court should grant *certiorari*. The "Question Presented" assumes facts not proven or offered by Petitioner in the underlying litigation. Thus, whether the "Question Presented" actually presents a question worthy of a grant of *certiorari* has no bearing on whether the case at bar should be reviewed by this Court. Here, *certiorari* should be denied.

RESPONDENTS' STATEMENT OF THE CASE

The Respondents, Officer Billy Jack Smith and the City of Poteau, Oklahoma accept Petitioner's Statement of the Case with the following additions and corrections.

Facts Relevant to Issues for Review

Petitioner is a 62-year-old female who owns a bar and resides in Poteau, Oklahoma. Respondent Billy Jack Smith is the Police Department Sergeant for Respondent City of Poteau, Oklahoma. Carla Belcher is a dispatcher for the Poteau Police Department and has experience as a jailer.

On October 28, 1991, at 2:00 a.m., Officer Smith stopped Petitioner's car at the intersection of Broadway and Parker in Poteau, a point near both the police station and Petitioner's residence. Smith made the stop because,

among other things, Petitioner was occupying two southbound lanes of traffic on Broadway. Petitioner was arrested for suspicion of driving under the influence of intoxicants ("DUI"), transporting a loaded firearm and possession of a controlled, dangerous substance.

At the police station, Petitioner was administratively handled by Officers Carla Belcher and W.R. Seale, II in connection with her DUI arrest and was observed during an alcohol deprivation period. The breathalyzer test administered to Petitioner tested 0.16, which is in excess of the maximum legal limit. Petitioner subsequently pled guilty to a reduced charge of reckless driving and paid a fine. The citation for transporting a loaded firearm was dismissed.

While Petitioner was being transported to the police station for her breathalyzer test, Sergeant Smith summoned a wrecker to tow away Petitioner's car. Prior to the arrival of the wrecker, Sergeant Smith conducted an inventory of Petitioner's car. The inventory revealed a tremendous quantity and variety of property within Petitioner's car. Among other things, currency and checks in the amount of $52,175.54 were discovered in the hatchback area of Petitioner's car during the inventory. $49,829.45 of the money discovered in the hatchback was in the form of U.S. currency. Petitioner's Brief acknowledges she was carrying pills wrapped in the cellophane from a cigarette wrapper at the time of her arrest. (Pet. Brf. at p. 10)

Sergeant Smith took the checks and currency to the police station to be counted for the inventory. Two Poteau Police Department employees assisted in counting. The

$52,175.54 in small bills and checks found in Petitioner's hatchback were separated by paperclipped scraps of paper with notations written upon the paper. Petitioner was given a document reflecting the final inventory tally of $52,175.54 at the completion of the inventory. All of the inventoried money in the form of checks was subsequently returned to Petitioner.

Petitioner was taken to the LeFlore County Jail under the DUI charge until she was sober. Some time later, Petitioner posted bond and was released from jail.

The currency was delivered to Detective Tamplin's custody after the inventory. The money was stored in the Poteau City Hall safe overnight. On the following day, October 29, 1991, the money was taken to the Poteau State Bank and deposited in the bank's vault.

The Poteau Police Department was aware of several law enforcement stops in the area where large amounts of currency were determined to have been drug related. Thus, on October 29, 1991, Oklahoma State Bureau of Investigations Agent Bob Almon was contacted. In turn, Agent Almon contacted the IRS and the DEA. Although the IRS conducted an extensive investigation, it ultimately declined to institute forfeiture proceedings.

Part of the DEA's investigation was to request the Poteau Police Department to use the Department's drug detection dog to see if the dog would positively identify the currency discovered in Petitioner's car as being tainted by narcotics. Indeed, the dog made a positive reaction to the currency and the DEA seized the currency on November 19, 1991. The DEA records indicate that it seized the entire $49,829.45.

The DEA properly provided Petitioner with notice of the seizure and forfeiture proceedings. The DEA transmitted the Notice of Seizure to Petitioner on December 16, 1991. (Resp. App. at 1) Petitioner acknowledged her receipt of the DEA Notice of Seizure on December 23, 1991. The DEA's Notice of Seizure was also published in the *USA Today* newspaper. At this point, Petitioner declined her opportunity to contest the DEA's forfeiture in a United States District Court. Rather, she chose to participate in the DEA's administrative forfeiture proceeding through her attorney.

The sole issue in the forfeiture hearing conducted by the DEA was the propriety of the DEA's seizure of the currency. The DEA entered its Declaration of Forfeiture on January 31, 1992.

Nature and Course of Proceedings

The District Court's disposition of this case followed the Respondents' Motions for Summary Judgment. Respondent Billy Jack Smith filed a separate Motion for Summary Judgment on November 15, 1993 requesting dismissal on the basis of his qualified immunity from suit. Petitioner's response disputed only the reason for her police stop on October 28, 1991, the location of her breathalyzer test and when her car was inventoried relative to her breathalyzer test. Respondent offered no other evidence to support her proffered "Uncontroverted Facts."

Respondents collectively filed a Motion for Summary Judgment on December 15, 1993 which was granted by the District Court's February 1, 1994 Order. Respondents'

Motion requested judgment from the District Court finding as a matter of law (1) the Respondents did not seize the currency discovered in the Petitioner's vehicle, (2) the Respondents did not forfeit the currency discovered in the Petitioner's car to the United States, (3) the seizure and forfeiture of the currency discovered in Petitioner's vehicle were beyond the control of the Respondents, and, (4) the Petitioner's claim is barred by collateral estoppel and/or *res judicata*.

Petitioner's Response Brief did not follow Fed. R. Civ. P. 56. The Respondents' statement of facts with supporting documents, testimony and affidavits were not controverted by Petitioner. Thus, Petitioner confessed the Respondents' statement of facts.

The District Court granted the Respondents' Motions on February 1, 1994. A review of the District Court's Order dismissing the instant case finds the court held that it was Petitioner's "election to challenge administrative forfeiture by petition for remission, rather than by posting a bond prior to judicial challenge" that bound Petitioner exclusively to the remedies available in the administrative proceedings. (Pet. for Cert. at p. 14a) In essence, the District Court held that a trial court could have assumed jurisdiction of the case and heard Petitioner's complaints concerning the alleged violations of her fourth and fifth amendment rights as a consequence of the seizure of the money found in her car. However, Petitioner's election to forego the judicial forum bound her to the remedies available within the administrative forum.

The Tenth Circuit Court of Appeals affirmed the District Court on June 5, 1995. The Tenth Circuit concurred with the District Court's conclusion that Petitioner's election to opt against a judicial forum for the forfeiture proceeding divested the District Court of jurisdiction to hear the allegations of constitutional rights violations. Thus, the corollary must also be true: the District Court sitting as a forum for a judicial forfeiture would have jurisdiction to conduct a plenary hearing of Petitioner's allegations attendant with the seizure and forfeiture of the money inventoried from her car. Significantly, Circuit Judge Henry's concurring opinion specifically found the Petitioner's DUI stop, arrest and search to have been "completely unremarkable – and constitutional." (Pet. Brf. at 9a)

SUMMARY OF ARGUMENT

The DEA investigated an incident where a large quantity of small denomination currency was discovered during an inventory of Petitioner's car subsequent to her lawful stop and arrest by the Respondents Sergeant Billy Jack Smith and the City of Poteau, Oklahoma. The DEA seized the currency and instituted forfeiture proceedings. Petitioner chose to contest the forfeiture through an administrative procedure by filing a Petition for Remission or Mitigation. Petitioner did not prevail and the currency was forfeited to the DEA. Petitioner did not appeal the forfeiture and it became final. Later, Petitioner brought 42 U.S.C. § 1983 claims against the Respondents alleging violations of her fourth and fifth amendment claims rights.

The Respondents filed a Motion for Summary Judgment noting that Petitioner had waived her right to bring the § 1983 claims. The District Court dismissed Petitioner's claim and held that it was divested of jurisdiction when Petitioner declined the opportunity to have her claims removed to a district court for a plenary hearing on the issues surrounding the forfeiture.

The Tenth Circuit Court of Appeals affirmed the District Court's dismissal. The Court of Appeals agreed that Petitioner had simply declined to exercise her right to pursue her § 1983 claims by failing to remove the proceedings to a district court. Moreover, Circuit Judge Henry specially noted that Petitioner's failure to contest the seizure in the proceeding designed expressly for that purpose was a serious mistake. However, after reviewing the record, Judge Henry also noted that Petitioner's § 1983 claims beyond the seizure and forfeiture would have arisen from a completely constitutional stop, arrest and search.

Here, Petitioner is essentially attempting to undo her previous waiver of her right to bring § 1983 claims against these Respondents. Summary judgment was proper where the law provided Petitioner with an opportunity to litigate her § 1983 claims in a district court. Summary judgment was also proper where the facts prove Petitioner had no viable § 1983 claim against these Respondents. Therefore, the Court should refuse to grant *certiorari*.

ARGUMENT AND AUTHORITY

Rulings by Lower Courts are Consistent

Petitioner argues that this case is complicated by a purported disparity in the bases for the District Court and circuit court's dismissal of this matter. However, a closer review of the District Court's February 1, 1994 Order and the Tenth Circuit's June 5, 1995 Order reveals both Orders to be consistent in their application of the law and facts of the case.

The District Court's Order initially notes that Petitioner had an opportunity for a plenary review before a District Court of the forfeiture and her several claims. However, in order to obtain the judicial forum, she was required to file a $250.00 bond.[1]

Thus, it was Petitioner's "election to challenge administrative forfeiture by petition for remission, rather than by posting a bond prior to judicial challenge" that bound Petitioner exclusively to the remedies available in the administrative proceedings. (Pet. for Cert. at p. 14a) In essence, the Order recognized that a District Court could have assumed jurisdiction of the case and heard Petitioner's allegations under 42 U.S.C. § 1983 concerning the seizure of the money found in her car. However, Petitioner's election to forego the judicial forum bound her to the remedies available within the administrative forum.

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[1] The DEA's Notice of Seizure provides for *in forma pauperis* filing by indigent claimants and explains how to request a waiver of the bond. (Resp. App. at 3)

Petitioner argues that the Court of Appeals' dismissal is "on an entirely different ground" than the District Court. To this end, Petitioner claims that the Tenth Circuit found the relief and remedies available in the forfeiture action were inadequate. Petitioner's statement is correct only insofar as it applies to the relief and remedies available to Petitioner withinan administrative forfeiture proceeding. Here, however, Petitioner has taken the court's language out of context and applied it to a judicial forfeiture. Petitioner's non-contextual assertion is simply not supported by the Orders from which she claims to refer.

Quite to the contrary of Petitioner's assertion, the Court of Appeals' June 5, 1995 Order held that Petitioner had been given an opportunity to present the instant claims in a judicial forum. (Pet. for Cert. at p. 7a) In fact, the court specifically held that

> "Indeed, had she elected to pursue the forfeiture in District Court as she clearly had the right to do, there would have been no jurisdictional difficulties at all regarding her § 1983 claim."

(*Id.*) It was Petitioner's election to opt against a judicial forum for the forfeiture proceeding that foreclosed the right to challenge the seizure or the underlying conduct leading to the seizure in District Court. The Court of Appeals very succinctly addressed the issue upon which Petitioner seeks *certiorari* when it declared its concern "to ensure that a plaintiff who alleges a violation of constitutional rights *is not denied a forum* in which to do so." (emphasis added) (Pet. for Cert. at p. 6a)

Here, it is quite plain that Petitioner was not denied the forum in which to bring her constitutional rights

allegations. Rather, Petitioner could have elected to challenge the underlying forfeiture in a judicial forum and brought separate claims against the Respondents. It is precisely this election that divested the District Court of jurisdiction. Thus, the District Court and Tenth Circuit's Orders are in accord.

Haring v. Prosise not Dispositive

Petitioner next contends *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 76 L. Ed. 2d 595 (1983) essentially rejects the District Court and Court of Appeals' decisions in the case at bar. However, Petitioner explains neither how *Haring* applies to the instant case nor how it is dispositive of the instant issue.

Haring v. Prosise was a review by this Court of the effect of a state criminal court defendant's opportunity to raise federal civil rights claims in a state criminal court trial. The primary issue addressed by the Court was whether a criminal defendant's guilty plea had a preclusive effect on a subsequent § 1983 claim arising out of the underlying fourth amendment issues. The *Haring* case turned on the opportunity the criminal defendant had been given in the criminal proceeding to litigate his § 1983 claim.

In *Haring*, the only issue raised in the criminal indictment was whether the defendant was guilty of the charge filed against him. Further, "none of the issues in the § 1983 action could have been 'necessarily' determined in the criminal proceeding." *Haring*, 462 U.S. at 316. Further still, a determination of the merits of the criminal defendant's § 1983 claim in the context of the guilty plea

proceeding "would have been entirely irrelevant." *Id.* Consequently, the *Haring* Court held that the criminal defendant's guilty plea had not afforded him with the opportunity to litigate his § 1983 claim.

In the case at bar, Petitioner was given a full and fair opportunity to litigate her claim in court. In fact, Petitioner was informed at the time of the DEA seizure that she had a right to have her claims brought in the forum of a district court. (Resp. App. at 1) However, Petitioner's own decision based upon the advice of counsel was to elect to pursue her claims in an administrative forfeiture proceeding.

Here, unlike in *Haring*, both the forfeiture proceedings and underlying § 1983 claims are civil in nature. Moreover, both the District Court and Tenth Circuit have acknowledged that Petitioner's § 1983 claims could have received a plenary hearing before a district court if the claims had been raised in a judicial forfeiture proceeding. Therefore, Petitioner was provided a forum and opportunity to litigate her § 1983 claims – she simply chose not to do so. The instant appeal is merely an attempt to undo her previous, binding election.

***Wilder v. Virginia Hosp. Ass'n* not Contrary to Tenth Circuit**

The other decision upon which Petitioner relies in her Petition is *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990). Petitioner's reliance on *Wilder* is also misplaced.

In *Wilder*, the Virginia Hospital Association sought declaratory and injunctive relief under 42 U.S.C. § 1983.

The petitioners in *Wilder* argued that the Hospital Association could not enforce a claim based upon the Boren Amendment to the Medicaid Act under § 1983. The Court noted that Congress must expressly preclude resort to § 1983 in order to abrogate a private reliance on § 1983 to enforce federally secured rights. *Wilder*, 496 U.S. at 520.

Here, it is not necessary for an administrative forfeiture under 26 U.S.C. § 7325 to provide Petitioner with the ability to assert her § 1983 claims. Rather, as the Tenth Circuit noted in the June 5, 1995 Order, Petitioner was given – and refused – an opportunity to bring her § 1983 in a plenary judicial forfeiture hearing. Thus, *Wilder* is distinguishable because the instant Petitioner was not precluded from asserting a § 1983 claim. To the contrary, Petitioner consulted an attorney and then elected to challenge the administrative forfeiture by petition for remission or mitigation in lieu of raising her § 1983 claims.

Petitioner's argument that *Wilder v. Virginia Hosp. Ass'n* is contrary to the Tenth Circuit's June 5, 1995 Order is premised on her conclusion that the Order requires a § 1983 action against state entities to "be preceded by a [26 U.S.C.] § 7325(3) suit." (Pet. for Cert. at p. 7) Here, it is not necessary for the Court to resolve Petitioner's stated issue because her stated issue is based upon a flawed premise. A closer review of the Order finds it does *not* hold that a § 1983 action against state entities must be preceded by a § 7325(3) suit. However, the Court of Appeals *does* note that Petitioner's election to not contest the seizure in the proceeding designed expressly for that purpose was fatal to her attempt to subsequently raise § 1983 claims. (Pet. for Cert. at p. 9a)

Petitioner's Stop, Arrest and Search Constitutional

Finally, Petitioner argues she is not now contesting the forfeiture of the money forfeited to the DEA; instead, she now frames her cause of action as a wrongful seizure by the Respondents. The law and facts do not support Petitioner's position.

It is important to note that Petitioner's initial stop, the inventory of her impounded car, the DEA's seizure of the money discovered in the inventory and the DEA's subsequent forfeiture are all interrelated. Both the District Court and Tenth Circuit were provided with an extensive record of the facts in this case. In fact, Circuit Judge Henry's concurring opinion specifically found the Petitioner's DUI stop, arrest and search to have been "completely unremarkable – and constitutional." (Pet. for Cert. at p. 9a) Further, it was never controverted that the DEA was the party who seized the money discovered in Petitioner's car. (Resp. App. at 1) Finally, Petitioner admits in her Brief that she may not now re-litigate the DEA's forfeiture of the money. (Pet. for Cert. at p. 8)

Respondents did not Seize or Forfeit Currency

The final issue Petitioner has apparently deemed worthy of a grant of *certiorari* is whether the Respondents violated her fourth amendment rights by seizing the money discovered in her car. Within this claim, Petitioner claims that the length of the detention is independently sufficient to state a § 1983 claim. However, Petitioner never controverted the fact that both the IRS and DEA

conducted investigations into the currency before the seizure occurred. Similarly, it must be recalled that Petitioner never controverted the fact that the DEA was the party who seized the money. (Resp. App. at 1)

Finally, it is significant to note that the "drug dog sniff" issue raised by Petitioner is not actually an issue. Here, it is uncontroverted that the Respondent City of Poteau's "drug dog" was only used at the request of the DEA. Further, it is uncontroverted that the Respondents took no action based upon the result of the dog's positive reaction to the currency. In sum, there is no evidence to support Petitioner's claim. Consequently, both the District Court and Tenth Circuit properly dismissed Petitioner's claims against the Respondents Billy Jack Smith and the City of Poteau, Oklahoma.

CONCLUSION

Petitioner was given an opportunity to bring her 42 U.S.C. § 1983 claims against the Respondents Billy Jack Smith and the City of Poteau, Oklahoma in a plenary hearing before a district court in a judicial review of the DEA forfeiture. Instead, Petitioner elected to file a Petition for Remission or Mitigation. Petitioner's choice to have her claims heard in an administrative forfeiture divested the District Court of jurisdiction to consider

Petitioner's § 1983 allegations. Here, the Court should deny *certiorari*.

Respectfully submitted,

ERIC D. JANZEN (OBA #13826)
Counsel of Record
CHARLES D. NEAL, JR. (OBA #6591)
Of the Firm:
STEIDLEY & NEAL
P.O. Box 1165
McAlester, OK 74502
918/423-4611

Attorneys for Respondents Billy Jack Smith and the City of Poteau, Oklahoma

DEFENDANT'S
EXHIBIT "G"

[LOGO] **U.S. Department of Justice**

Drug Enforcement Administration

SEIZURE #: ILLEGIBLE CASE #: ILLEGIBLE
PROP: $49,829.45 U.S. CURRENCY

VALUE: $49829.45
SEIZURE DATE: 91 NOV 19
SEIZURE PLACE: POTEAU, OK

SID FROM: ATCHLEY, MARGARET K
OWNER:
JUDICIAL DIST: OKLAHOMA EASTERN
BOND REQUIRED: 34983
DATE OF THIS LETTER: 16 DEC 91
DATE OF FIRST PUBLICATION: 91 DEC 24

ATCHLEY, MARGARET M
109 DOWNEY
POTEAU
OK 74913

1088878

NOTICE OF SEIZURE

The above-described property was seized by Special Agents of the Drug Enforcement Administration (DEA) for forfeiture under Title 21, United States Code (U.S.C.), Section 881, because it was used or acquired as a result of a drug-related offense. (See Title 21, Code of Federal Regulations (C.F.R.), Section 1316.91(d) (54 Federal Register 37610-37611) for the definition of the term "drug-related offense.") The seizure date and place, as well as other pertinent information regarding the property are

also shown above. Pursuant to Title 19, U.S.C., Sections 1602-1619, and Title 21, C.F.R., Sections 1316.71-1316.81, procedures to administratively forfeit this property are under way. You may petition the DEA for the return of the property or your interest in it (remission or mitigation), and/or you may contest the seizure and forfeiture of the property in court. Also, under certain circumstances, you may petition for the expedited release of the property. You should review the following procedures very carefully.

TO REQUEST REMISSION OR MITIGATION OF THE FORFEITURE

If you want to request the remission (pardon) or mitigation of the forfeiture, submit a petition for remission or mitigation within thirty (30) days from your receipt of this notice. Follow the regulations set forth in Title 28, C.F.R., Sections 9.1-9.7. State the facts and circumstances which you believe justify return of the property or return of your interest in the property. File an original petition and two copies with the DEA's Asset Forfeiture Section. No bond is necessary if only a petition is filed. Pursuant to Title 28. C.F.R., Section 9.4(c), a petition for remission or mitigation of forfeiture shall be signed and sworn to by the petitioner.

TO CONTEST THE FORFEITURE

In addition to or in lieu of petitioning for remission or mitigation, you may contest the forfeiture of the seized property in UNITED STATES DISTRICT COURT. To do so, you must file a claim of ownership and cost bond with

the DEA. Submit the bond in the amount shown above in the form of a cashier's check or a certified check payable to the U.S. Department of Justice, or present satisfactory surety. *Claims must be signed by the parties making the claim.* Unsupported submissions signed by attorneys are insufficient to satisfy the requirement the claims be personally executed. *United States v. Fifteen Thousand Five Hundred Dollars,* 558 F.2d 1359, 1360 (9th Cir. 1977).

If you see indigent (needy and poor) you may not have to post the bond. To request a waiver of the bond, you must fully disclose your finances in a signed statement called a "Declaration in Support of Request to Proceed *In Forma Pauperis*" along with a claim of ownership of the property. Use the format of the *pauperis* declaration shown as Form 4 in the Appendix of Forms following Rule 48 of the Federal Rules of Appellate Procedure or obtain a form from a DEA field office. The claim of ownership, with either bond or the "Declaration in Support of Request to Proceed *In Forma Pauperis*" must be filed within *Twenty (20) days* of the *first date* of publication of the notice of seizure in the edition of the *USA Today* newspaper referenced above. The notice will be published three successive weeks.